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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

EVA JEAN FERREIRA, Individually and
as Executor, etc.,

Plaintiff, Cross-defendant and
Appellant,

v.

HOMEPORT INSURANCE COMPANY,
et al.,

Defendants, Cross-complainants and
Appellants.

A129546

(Alameda County
Super. Ct. No. RG08377544)

Plaintiff Eva Ferreira, who filed this suit as an individual and as executor of her late husband's estate, appeals from a final judgment for defendants Homeport Insurance Company, Stevedore Services of America and SSA Marine. Ferreira sought damages on account of an unpaid workers' compensation settlement agreement that was pending but not yet approved at the time of her husband's death. The case was tried to the court, and Ferreira seeks review of two pre-trial orders that limited her causes of action. One order sustained without leave to amend the defendants' demurrer to her causes of action for breach of contract, for breach of the covenant of good faith and fair dealing, and for

declaratory relief. The other order granted defendants summary adjudication on Ferreira's causes of action for negligent and intentional infliction of emotional distress.

Defendants cross-appeal from a judgment entered in favor of Ferreira following trial on their cross-complaint for promissory estoppel. The cross-complaint sought the satisfaction by Mr. Ferreira's estate of a lien in favor of Homeport on any recovery in actions against third parties for his work-related injuries.

We affirm. The demurrer was correctly sustained on the basis that Ferreira's contractually related claims were barred by the exclusive remedy provision of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. § 905(a)) (LHWCA). The entry of summary judgment on Ferreira's emotional distress claims was proper because the defendants' conduct surrounding their refusal to pay the workers' compensation settlement fell within the litigation privilege. Finally, we conclude the cross-complaint was time barred under the one-year limitations period in Code of Civil Procedure, section 366.2.¹

FACTUAL BACKGROUND

In July 2003, decedent Lester Ferreira was injured while working as a longshoreman for a subsidiary of defendant SSA Marine. Homeport is SSA Marine's workers' compensation insurer.

In June 2006, Mr. Ferreira and Homeport reached an agreement in principle to resolve his claim for workers' compensation against SSA, along with all possible claims he may have had for cumulative trauma over his career as a longshoreman, and any claims for reimbursement SSA or Homeport would have against Ferreira's recoveries against third parties for his July 2003 injury.

Once the U.S. Department of Labor approved the settlement, Homeport was to pay Ferreira \$370,000 over and above any compensation benefits previously paid for the

¹ Hereafter referred to as section 366.2.

2003 injury. Ferreira was also required as part of the settlement to assert all his possible state compensation claims for cumulative injury and retire as a longshoreman. Homeport agreed to withdraw any claims for subrogation or lien rights to recovery obtained by Ferreira against the Port of Stockton or the ship involved in the 2003 mishap. Ferreira also assured defendants that he had not applied for social security benefits.

In the months following the June 2006 agreement, Ferreira, with the assistance of his counsel, tried to complete the steps needed to submit the settlement to the U.S. Department of Labor. He retired as a longshoreman effective November 14, 2006. By December 2006, it was the Ferreriras' position that Mr. Ferreira had done all that was necessary for the settlement to be sent to the U.S. Department of Labor for approval, with one exception. Due to his retirement and defendants' cessation of temporary disability payments, Mr. Ferreira had applied for social security disability benefits. The issues surrounding possible repayment of those benefits appear to have been resolved between the parties by February 2007.

By June 2007, the settlement appeared once again to be on track for submission to the Department of Labor. There was a final issue regarding the documentation needed to include a September 2003 injury among the career compensation claims. That documentation was complete by June 27th. But in April 2007, Mr. Ferreira was diagnosed with pancreatic cancer, and he died on July 27th. At the time of his death, Mr. Ferreira had not yet signed the application for approval of the settlement and it had not yet been submitted to the Department of Labor. An agreed provision regarding the scope of the release set forth in the application for approval provided that: "In the event of Claimant's death before this filing of the Order Approving this . . . Settlement Agreement, then the Agreement shall be null and void with no obligation of the [Defendants] to pay any money to Claimant's survivors, to Claimant's heirs, or to Claimant's estate." Defendants notified Mrs. Ferreira that they would not effectuate the settlement.

PROCEDURAL HISTORY

Mrs. Ferreira filed this suit in March 2008. Her complaint alleged causes of action for breach of written and oral contract; promissory estoppel; breach of the implied covenant of good faith and fair dealing; negligent and intentional infliction of emotional distress; an unlawful business practice; and declaratory relief.

Defendants demurred to the complaint on the grounds that Ferreira's entire action was barred by the exclusive remedy provision of the LHWCA provided at 33 U.S.C. section 905(a). The demurrers to the causes of action for breach of contract, breach of the covenant of good faith and fair dealing, and declaratory relief were sustained without leave to amend. The demurrers to the other causes of action were overruled, and Ferreira re-alleged them in a first amended complaint. Defendants again demurred, but the trial court overruled the demurrer in its entirety.

Defendants answered and cross-complained asserting causes of action for promissory estoppel and unjust enrichment. Ferreira answered the cross-complaint. The court denied the motion with respect to causes of action for promissory estoppel, unjust enrichment and unlawful business practice, but granted summary adjudication in favor of defendants on the causes of action for negligent and intentional infliction of emotional distress. Following a trial to the court on the remaining claims, judgment was entered for defendants on Mrs. Ferreira's complaint, and in her favor on the defendants' cross-complaint. The court determined the cross-complaint was time-barred by section 366.2.

Defendants were awarded costs. Plaintiff Ferreira timely appealed from the judgment, and defendants timely cross-appealed.

DISCUSSION

A. The Ruling on Demurrer

The trial court sustained demurrers without leave to amend directed at Ferreira's causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief on the basis that those causes of action were preempted by the exclusive remedy provision in the LHWCA at 33 U.S.C. section 905 (a).² The trial court concluded that: "Because the LHWCA provides a comprehensive system regarding the provision and payment of benefits, including a required method for approving settlements of such claims, state law claims seeking enforcement of agreements to settle or resolve disputes over compensation claims are preempted."

Mrs. Ferreira says the trial court was wrong because the agreement she seeks to enforce was broader than her husband's claim for benefits under the LHWCA, and his LHWCA claim was just a part of a "global settlement." According to Ferreira, the breach of contract and related claims were based on a side agreement that falls outside the compensation arena. The side agreement encompassed only the "pre-submission

² 33 U.S.C. section 905 (a) provides: "Employer liability; failure of employer to secure payment of compensation. The liability of an employer [for injuries to an employee as] prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title."

requirements” of Mr. Ferreira’s retirement and the cumulative injury claims. The LHWCA workers’ compensation settlement was a more narrow agreement that was just a portion of the “global settlement” that resolved all her husband’s claims. As such, Mrs. Ferreira argues that the court should have allowed her contract-based causes of action on the side agreement to proceed. The fundamental problem with her argument is that it conflicts with the specific allegations of Ferreira’s complaint.

“On appeal from a judgment after a demurrer is sustained without leave to amend, we assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and facts of which judicial notice can be taken. . . . We construe the pleading in a reasonable manner and read the allegations in context. . . . We determine de novo whether the pleading alleges facts sufficient to state a cause of action. . . . We affirm the sustaining of the demurrer if the pleading or matters that are judicially noticeable disclose a complete defense. . . . We affirm the judgment if it is correct on any ground stated in the demurrer, regardless of the trial court’s stated reasons.” (*Sygenta Crop Protection, Inc. v. Helliker* (2006) 138 Cal.App.4th 1135, 1181, citations omitted.) The specific allegations of a complaint also control over more general assertions. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1390.)

The allegations of the complaint do not support Mrs. Ferreira’s claim of a side agreement that was separate and severable from the LHWCA settlement. While it is true that the LHWCA settlement was part of a “global settlement” that also involved Ferreira’s claim against the Port of Stockton, the obligations related to his career injury claims and retirement were pleaded as conditions precedent to the defendants’ obligation to submit the LHWCA settlement to the U.S. Department of Labor. They did not constitute a separate side agreement that could be independently enforced in a state court complaint. Characterization of the obligations to retire and assert cumulative injury claims as constituting a side agreement is a legal “conclusion of the pleaders, and cannot

overcome the legal effect of the facts from which the conclusion is attempted to be drawn.” (*Bank of America Etc. Assn. v. Radford* (1936) 7 Cal.2d 205, 208.) Reading the allegations of the complaint in context, resolution of Ferreira’s LHWCA claim was a component of a global settlement, and the defendants’ obligation to forward the terms of the settlement to the Department of Labor for approval was subject to conditions precedent that Ferreira retire and submit all his possible claims for work-related injuries. The conditions precedent do not constitute a separate agreement that could be enforced in the Superior Court.

Ferreira argues that her causes of action are not preempted because there is case authority that recognizes certain disputes relating to workers’ compensation benefits may be litigated in a civil action. She relies principally on *Martin v. Travelers Insurance Company* (1st Cir. 1974) 497 F.2d 329. But *Martin* is readily distinguished. *Martin* allowed a breach of contract action to proceed against an LHWCA insurer who stopped payment on benefits checks issued to a claimant after a workers’ compensation award was approved by the Department of Labor. Unlike this action, *Martin* did not involve the determination of benefits payable under the LHWCA, and unlike Ferreira’s, the *Martin* plaintiff’s cause of action did not arise in the course of employment. The only issue in *Martin* was the manner and timing of the payment of a workers’ compensation award. Here, there has been no award, and the dispute centers on the payment of the settlement of an LHWCA claim for benefits that was never approved by the Department of Labor.

The trial court correctly sustained the defendants’ demurrers to Ferreira’s causes of action for breach of written contract, breach of oral contract, breach of the covenant of good faith and fair dealing and declaratory relief without leave to amend on the grounds that they were preempted by the exclusive remedy provision in the LHWCA at 33 U.S.C. section 905(a).

B. Summary Adjudication

In her first amended complaint, Ferreira charged the defendants with negligent and intentional infliction of emotional distress due to their refusal to process and conclude the settlement following her husband's death. Both causes of action were resolved in favor of defendants on summary adjudication. The trial court entered judgment on the cause of action for negligent infliction of emotional distress on the grounds that defendants did not owe Ferreira a duty of care to avoid inflicting emotional harm upon her. The court granted summary adjudication on the intentional infliction claim on the basis that defendants' refusal to conclude the settlement was not outrageous conduct. In addition, the trial court concluded that defendants' actions that gave rise to the emotional distress claims fell within the litigation privilege. Because we agree that defendants' conduct was within the scope of the litigation privilege, we affirm the grants of summary adjudication.

The appellant has the burden to affirmatively demonstrate error. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.) In the absence of such a showing, we presume the order of the trial court is correct on appeal "and all intendments and presumptions are indulged in favor of its correctness." (*Ibid.*) Ferreira's opening brief makes no argument that the trial court was wrong when it concluded that a substantial portion of defendants' conduct was within the litigation privilege.³ That alone warrants our affirmance on this ground.

Moreover, we conclude the trial court's rulings were correct. We review an order granting summary judgment de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860; *Scheiding v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64,

³ Ferreira's reply brief primarily addresses the issue as one of evidentiary privilege for statements made in the context of settlement or mediation under Evidence Code section 1125, subdivision (a)(5), and whether defendants waived the privilege by offering statements about the global settlement into evidence. The argument has no relevance to the Civil Code section 47 subdivision (b) litigation privilege. Therefore, we need not address it.

69.) A defendant who moves for summary judgment has the initial burden to show that a cause of action lacks merit because one or more of its elements cannot be established or it is subject to an affirmative defense. (Code Civ. Proc., § 437c, subd. (o); *Aguilar v. Atlantic Richfield Co.*, *supra*, at p. 850.) If the moving papers make a *prima facie* showing that justifies a judgment in the defendant's favor, the burden shifts to the plaintiff to show the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, at p. 849.)

Defendant's motion claimed that all their actions were communicative in nature and thus within the scope of the litigation privilege. For well over a century, the litigation privilege, as codified in Civil Code section 47 subdivision (b), has applied to protect parties from possible liability on account of communications having some relation to judicial proceedings. (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1193.) California courts give the privilege an expansive reach, and it can apply to immunize all possible torts except malicious prosecution. (*Id.* at p. 1194.) The privilege may also attach to communications made in administrative proceedings and those by counsel for a party pertaining to settlement discussions. (*Harris v. King* (1998) 60 Cal.App.4th 1185, 1187; *Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 Cal.App.4th 17, 24.)

"[T]he litigation 'privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. [Citations.]' [Citation.]" (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1058.) There is little doubt that each of those elements is present in this case.

In her separate statement of facts filed in the trial court, Ferreira did not dispute that the defendants communicated their position that they would not conclude the settlement following her husband's death through their counsel. Indeed, Ferreira's causes of action for emotional distress are premised on communications by defendants' counsel

to her husband's workers' compensation attorney. She alleges that: "when a demand for the submission of the agreement [to the Department of Labor] was made by Plaintiff's compensation attorney, Defendants advised counsel that it was the position of Homeport and SSA that the settlement was void as a result of Mr. Ferreira's death and that they would not be paying Mr. Ferreira's widow the balance of the \$370,000."

To the extent that Ferreira claims in her reply brief that her emotional distress claims are predicated on the defendants' conduct in refusing to honor the settlement, not the communication of their position, she misses the mark. " '[I]f the gravamen of the action is communicative, the litigation privilege extends to noncommunicative acts that are necessarily related to the communicative conduct Stated another way, unless it is demonstrated that an independent, noncommunicative, wrongful act was the gravamen of the action, the litigation privilege applies.' " (*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 957.) Here, Ferreira seeks to recover damages for the emotional distress she experienced when she learned of defendants' position that the settlement of her husband's LHWCA claim was not effective as a result of his death. The litigation privilege of Civil Code section 47 applies in this case, and Ferreira has made no showing to the contrary.

Ferreira's claim that defendants were aware of her husband's last illness and delayed consummating the agreement in anticipation of his death, does not change our analysis. Even if Ferreira raised a genuine dispute of fact over whether defendants acted from an improper motive, which she did not, the litigation privilege applies. The privilege is absolute and applies to all publications irrespective of their maliciousness. (*Olsen v. Harbison* (2010) 191 Cal.App.4th 325, 333.)

C. Judgment on the Cross-complaint

The LHWCA provides an employer or compensation insurer a right to obtain reimbursement of benefits paid to an injured employee from third parties who are responsible for the employee's injury. (33 U.S.C. § 933(b).) In situations when the employee brings an action against a third party, a combination of the express provisions

of the LHWCA and the cases interpreting it establishes that the employer may assert a lien against any recovery by the employee for the full amount of the paid benefits. (*Peters v. No. River Ins. Co. of Morristown, N.J.* (5th Cir. 1985) 764 F.2d 306, 312; see *Jones & Laughlin Steel Corp. v. Pfeifer* (1983) 462 U.S. 523, 530, fn. 5; *National Metal & Steel Corp. v. Colby Crane & Manufacturing Co.* (1988) 200 Cal.App.3d 1111, 1117.) Pursuant to 33 U.S.C. section 933(h), where the employer's insurance carrier has assumed the payment of the employee's compensation, the carrier is subrogated to all of the employer's rights under 33 U.S.C. section 933. The employee is entitled to retain proceeds in excess of the compensation lien. (33 U.S.C. § 933(f); *Todd Shipyards v. Office of Workers Compensation* (9th cir. 1998) 139 F.3d 1309, 1312.)

As part of the global settlement, the defendants agreed to withdraw any subrogation claim or lien they may have had on Ferreira's recoveries against the ship or the Port of Stockton for the repayment of over \$200,000 of workers' compensation benefits. By cross-complaint, defendants alleged that in reliance upon the terms of the settlement, they did not assert their rights to recoupment from Ferreira's recoveries against third parties. Since defendants lost their lien rights, they sought repayment of the benefits from Mr. Ferreira's estate under causes of action for promissory estoppel and unjust enrichment.

At trial, Ferreira argued that the cross-complaint was time barred by the one-year limitations period for claims existing at the time of a party's death as provided in section 366.2. The cross-complaint was filed on December 1, 2008. Since Mr. Ferreira died on July 27, 2007, Ferreira argued the cross-complaint was untimely. The court issued an intended statement of decision that stated the claim for reimbursement was not time barred because it did not exist at the time of Mr. Ferreira's death. Ferreira objected, and the court's final statement of decision concluded "[t]he evidence shows that [defendants'] claim for reimbursement did exist at the time of Mr. Ferreira's death, see *Bradley v.*

Breen [(1999)] 73 Cal.App.4th [798] and therefore the cross-complaint is time-barred, Code of Civil Procedure [section] 366.2.”

Without citation to authority, defendants contend that Ferreira waived her argument that the cross-complaint was untimely because she did not adequately assert it in the trial court. We disagree. In her trial brief filed in early January 2010, Ferreira clearly stated her position that the cross-complaint was time barred under section 366.2. We also reject defendants’ claim that they had no opportunity to address the specific theory relied upon by Ferreira in arguing the applicability of this statute of limitations. The record shows the issue was extensively briefed before the trial court.

Resolution of this issue turns on whether, under section 366.2, defendants were required to file their claims for repayment of benefits against Mr. Ferreira’s estate within a year of his death. With certain exceptions that are not relevant to this appeal, section 366.2 subdivision (a) provides: “If a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, and whether accrued or not accrued, dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply.”

Defendants argue that the time bar of section 366.2 does not apply in this case because their claims for promissory estoppel and unjust enrichment did not exist at the time of Mr. Ferreira’s death. According to defendants, they could not have brought their causes of action until Ferreira filed and prosecuted her complaint in this action. We disagree. Defendants’ argument is premised upon a mischaracterization of the right they seek to enforce by the cross-complaint.

“The essence of a cause of action is the existence of a primary right and one violation of that right, i.e., it arises out of an antecedent primary right and corresponding duty, and a breach of such primary right and duty by the person upon whom that duty rests. . . . The primary right and duty and the delict or wrong constitute the cause of

action in the legal sense. . . . ‘The cause of action is simply the obligation sought to be enforced.’ . . . ‘The cause of action is to be distinguished from the remedy which is the means by which the obligation or the corresponding action is effectuated, and also from the relief sought.’ . . . Accordingly, if the action is brought to enforce a single right violated by the defendant, the complaint states but one cause of action regardless of the number of types of relief sought and notwithstanding that it alleges several theories of recovery. . . . Consonant with this latter principle is the rule that ‘[a]ll damages arising from a single wrong, though at different times, make but one cause of action.’ ” (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 739–740, citations omitted.)

The right defendants seek to enforce is their entitlement to repayment of compensation benefits paid to Mr. Ferreira under the LHWCA, a right they relinquished in reliance upon the global settlement. Their cause of action accrued upon Mr. Ferreira’s death when approval and consummation of the settlement was no longer possible. As alleged in the cross-complaint, “Language in the proposed settlement documents specified that the settlement would be null and void should [Mr. Ferreira] die before approval of the settlement.” It is Mr. Ferreira’s death that triggered defendants’ cause of action, and not the suit filed by Mrs. Ferreira seeking to enforce the settlement. Moreover, defendants seek to enforce the personal liability of Mr. Ferreira for his failure to conclude the settlement and seek the return of benefits paid to him. The plain language of section 366.2 requires that claims against a decedent, whether accrued or unaccrued, be filed within a year of the decedent’s death. (*Bradley v. Breen, supra*, 73 Cal.App.4th 798, 803–805 (*Breen*).) This bar applies even when the operative pleading seeks to enforce a claim for indemnity that has not matured at the time of the decedent’s death. (*Ibid.*) Defendants rely on *Estate of Yool* (2007) 151 Cal.App.4th 867 (*Yool*), to argue that section 366.2 does not apply to bar claims like theirs. But *Yool* is inapposite.

Yool was an action brought by an administrator to determine title to a decedent’s property on a theory of resulting trust. Because an action for resulting trust “does not

implicate the personal liability of the purported trustee,” the court of appeal concluded section 366.2 did not apply as the action was not founded upon a debt of the decedent. (*Yool, supra*, 151 Cal.App.4th. at p. 876.) Moreover, on the facts of that case, since the decedent trustee had not repudiated the existence of the trust, there was no cause of action, accrued or not yet accrued, in existence at the time of the decedent’s death. (*Ibid.*) The *Yool* court distinguished the situation before it from that before the court in *Breen, supra*, 73 Cal.App.4th 798.

In *Breen*, section 366.2 applied to bar an action by a decedent’s alleged joint tortfeasors who cross-complained for equitable indemnity when they were sued almost four years after his death. The court of appeal rejected their argument that section 366.2 should not apply because it would have been impossible for them to cross-complain against the estate within one year of the decedent’s death because no suit was brought against them within that time. The court held that section 366.2 reflects the Legislature’s determination that a one-year statute of limitations best effectuates the strong public policy of expeditious and final administration of decedent’s estates, despite the possibility that in a rare case it will foreclose an action for indemnity. (*Breen, supra*, 73 Cal.App.4th at p. 805.) So too, here.

Defendants’ cross-complaint is more like the cross-complaint for indemnity in *Breen* than the trustee’s petition in *Yool*. As the *Yool* court observed, “the court in *Breen* recognized that section 366.2 ‘governs causes of action against a decedent *that existed at the time of death*, “whether accrued or not accrued.” ’ [Citation.] In other words, a cause of action that is nascent but not complete will survive, such that a plaintiff’s rights may ripen into an actionable claim after a decedent’s death.” (*Yool, supra*, 151 Cal.App.4th. at p. 877.) Here, any claim defendants had against Mr. Ferreira was nascent and ripened when he died. The trial court correctly concluded the cross-complaint was barred by section 366.2 for defendants’ failure to file it within one year of his death.

DISPOSITION

The judgment is affirmed. Each party is to bear their own costs.

Siggins, J.

We concur:

McGuiness, P.J.

Jenkins, J.